No. 86-1099

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

CHRISTOPHER N. GALANOS,

Petitioner,

versus

HONORABLE ALEX T. HOWARD, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WRIT OF CERTIORARI

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QUESTION PRESENTED

1. The question is whether federal courts must recognize the state and federal privilege which affords protection to the confidences disclosed by a patient (petitioner) to his psychiatrist, when the patient's mental state is not an issue in the litigation. This privilege is or should be constitutionally protected.*

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* The parties in this case are: William H. McGill, plaintiff; and Defendants City of Mobile, Winston J. Orr, Lester Hargrove, Charles S. Summers, and Petitioner Galanos. Defendants Bernard Henebry and Robert P. Larison are deceased and have been dismissed pursuant to Rule 25 of the Federal Rules of Civil Procedure. This case has been on the docket of Judge Emmett R. Cox at all times relevant to this petition. The case was transferred to the docket of Judge Alex T. Howard, Jr. on October 15, 1986. App. I, *infra* 45a. Therefore, The Honorable Judge Alex T. Howard, Jr. is named as the Respondent herein.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

CHRISTOPHER N. GALANOS,

Petitioner,

versus

HONORABLE ALEX T. HOWARD, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A writ of certiorari is sought to review the Court of Appeal's order denying petitioner's constitutionally protected patient/psychiatrist privilege.

OPINIONS BELOW

There was no formal opinion by the United States Court of Appeals for the Eleventh Circuit. The order of that court denying petitioner's writ of mandamus is set forth in App. H, *infra*, 44a. The District Court Judge's (Respondent's) Memorandum Opinion denying petitioner's motion to quash depositions and motion for protective order is set forth in App. G, *infra*, 42a-43a.

JURISDICTION

The order of the Court of Appeals (App. H, *infra*, 44a) was entered on October 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1982).

This petition for a writ of certiorari is being filed within ninety (90) days from the denial of petitioner's writ of mandamus on October 3, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fed. R. Evid. 501 provides, in pertinent part, that:

> ". . . [T]he privilege of a witness, person . . . shall be governed by . . . the common law as . . . interpreted by the Courts of the United States . . . [I]n civil actions and proceedings, with respect to a claim or defense as to which State law supplies the rule of decision, the privilege shall be determined in accordance with State law."

2. Ala. Code §34-26-2 (1975) provides, in pertinent part, that:

> ". . . [T]he confidential relations and communications between . . . licensed psychiatrists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed."

3. 42 U.S.C. §290ee-3 (1985) provides, in pertinent part, that:

> "Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function . . . shall . . . be confidential and be disclosed only . . . under subsection (b) of this section."

4. 42 C.F.R. §2.13(c) (1985) provides, in pertinent part, that:

> "The prohibition or unauthorized disclosure covers all information about patients . . ."

STATEMENT OF THE CASE

A. FACTS MATERIAL TO THE QUESTION PRESENTED

This action was instituted on August 14, 1984, as a complaint for damages for wrongful termination of employment against various defendants, including petitioner Galanos. Plaintiff was a police officer for the City of Mobile. His complaint goes to the sufficiency of the process afforded him in his termination, the reasons for his termination, an allegation that there was a conspiracy for his termination, and an allegation that plaintiff's first amendment "right to prosecute" defendant Galanos was infringed. App. B, *infra* 12a-29a. Named as defendants are plaintiff's employer, the City of Mobile, various supervisors in the police department who plaintiff alleges conspired to terminate him, and petitioner Galanos. Galanos is the district attorney for Mobile County. The complaint arises out of an incident wherein plaintiff detained petitioner Galanos. Plaintiff's basic theory is that Galanos was driving under the influence of alcohol or drugs;

that plaintiff tried to arrest Galanos but that his supervisors interfered; and that the City, his supervisors and Galanos thereafter conspired to terminate plaintiff's employment.

Following plaintiff's notice of deposition of Galanos' psychiatrist, Galanos filed a motion to quash asserting the psychiatrist-patient privilege. App. C, *infra* 30a-31a. On December 27, 1985, the Magistrate recommended that Galanos' motion to quash be denied. App. D, *infra* 32a-34a. Galanos filed an objection to the Magistrate's recommendation on January 2, 1986. App. E, *infra* 35a-36a. An amended motion to quash was filed on February 3, 1986. App. F, *infra* 37a-41a. The District Court Judge accepted the Magistrate's recommendation on June 25, 1986. App. G, *infra* 42a-43a. Galanos then petitioned the Eleventh Circuit Cout of Appeals for a writ of mandamus ordering the district judge to quash the deposition of his psychiatrist. The Eleventh Circuit denied this petition on October 3, 1986. App. H, *infra* 44a.

B. BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

Plaintiff alleges jurisdiction pursuant to 28 U.S.C. §§1331 and 1343 (1982) claiming violations of his civil rights under 42 U.S.C. §§1983 and 1985 (1982). App. A, *infra* 1a-11a.

C. REASONS FOR GRANTING THE WRIT

1. ***Petitioner did not inject his mental state as an issue.***

As the issues are framed by plaintiff's complaint, Galanos' communications with his psychiatrist are not at issue. What plaintiff must show on his causes of action is wholly unrelated to whether Galanos was in the state which plaintiff alleges on that evening. Plaintiff's complaint goes to the sufficiency of

the process afforded him in his termination, the reasons for his termination, an allegation that there was a conspiracy for his termination, and an allegation that his first amendment rights were punished. Galanos' mental state, therefore, simply does not bear on the issues in this case.

2. ***There is a Violation of Galanos' Constitutional Rights***

Through a series of cases addressing various particular issues, this Court has recognized a zone of privacy as a fundamental constitutional right. These cases include *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); and *Griswold v. Connecticut*, 381 U.S. 479 (1965). The California Supreme Court has even suggested that the United States Constitution mandates protection of confidentiality for psychotherapy:

> [A] patient's interest in keeping such confidential revelations from public review, in retaining his substantial privacy, has deeper roots than the California [statutory rules of evidence] and draws sustenance from our constitutional heritage. In *Griswold v. Connecticut*, [citation omitted], the United States Supreme Court declared that "Various guarantees [of the Bill of Rights] create zones of privacy," and we believe that the confidentiality of the psychotherapeutic session falls within one such zone.

In re Lifschutz, 85 Cal. Rptr. 829, 839, 467 P.2d 557, 567 (1970). It is the first amendment which has largely been cited as the source of this "right of privacy." The fourth amendment provides that people have the right to be secure in their persons, and exposing oneself in psychotherapy is arguably within the ambit of protection from this amendment. Should

a confidence be exposed to a psychotherapist which might tend to incriminate the patient, then obviously the fifth amendment should apply.

The ninth amendment recognizes that certain rights which people have shall not be denied or disparaged, and the tenth amendment specifically says that powers not delegated to the United States by the Constitution are reserved to the states, respectively, or to the people. From this it is arguable that the states' decision regarding confidentiality must be respected. This is discussed in the cases which follow.

3. ***Federal Law Recognizes Confidentiality for Certain Chemically Dependent Persons***

Congress has recognized the necessity for treatment of chemically dependent people. Assume for purposes of argument that what counsel for plaintiff asserts in his motion is true; namely, that Galanos was seeking treatment from his psychiatrist for drug abuse. Certainly this Court should look to the expressed policy of Congress as set forth in 42 U.S.C. §290ee-3 (1985). See "Constitutional and Statutory Provisions Involved" section, *supra*, p. 3.

This federal privilege for persons seeking treatment for chemical abuse would apply to any individual who has applied for or been given diagnosis or treatment for alcohol or drug abuse. 42 C.F.R. §2.11(i) (1985). The prohibition of the disclosure of information about an alcohol or drug abuse patient covers *all* information about patients, including their "attendance or absence, physical whereabouts, or status as patients." 42 C.F.R. §2.13(c) (1985). When the Code of Federal Regulations provides that the hospital or provider of medical care may not even cite the particular code sections when telling a court of law why they may not produce certain records, that is an extremely strong statement.

42 C.F.R. §2.13-1(d) (1985). Counsel of record has had the unfortunate experience of going through that in the Mobile County Circuit Court, and it is assuredly a tenuous proposition at best. Because of the congressional recognition for the need for privacy in the area of the psychiatrist/psychologist-patient relationship the courts have the authority to recognize this privilege. *See, e.g., In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied* 461 U.S. 983 (1983).

As noted in *Zuniga*, the psychotherapist-patient privilege is *mandated* by reason and experience, *citing* Fed. R. Evid. 501, at 639. *Zuniga* further cited *forty* states which have adopted some form of privilege in this context. *Id.* at n.3. As the Eleventh Circuit recognized in *Matter of International Horizons, Inc.*, 689 F.2d 996, 1004 (11th Cir. 1982):

> There is indeed authority for the proposition that federal courts should recognize state evidentiary privileges where this can be done at no substantial cost to federal policies.

Indeed, here the federal and state policies are identical.

4. ***State Law Recognizes a Privilege***

The psychiatrist-patient privilege is codified at *Ala. Code* §34-26-2 (1975), *supra*, p. 2.

5. ***Comity and Federalism***

Foremost, it is indeed strange to conceive that the testimony of this doctor could be privileged in state court, and not privileged in federal court. How that can be reconciled with constitutional principles of comity and federalism strains the imagination, even though decisions of some courts of appeal violate these principles.

For example, in a case arising out of the Middle District of Alabama, *Broadway v. City of Montgomery*, 381 F. Supp. 514 (M. D. Ala. 1974), Judge Varner stated without further explanation:

> In Federal Courts privilege is determined under state law. *Connecticut Mutual Life Insurance Co. v. Union Trust Co.*, 112 U.S. 250, 5 S.Ct. 119, 28 L.Ed. 708.

Id. at 516 n.1. Recognize that Judge Varner believed that the *Union Trust Co.* case, which will be discussed later (which held that a New York statute prohibited a physician from testifying) was still good law.

Moreover, various other jurisdictions have noted that failure to apply state rules of privilege would cause "a serious problem of interference with state policy." *See, e.g., Krizak v. W.C. Brooks & Sons, Inc.*, 320 F.2d 37, 43 (4th Cir. 1963). In *Krizak*, a state law prohibited accident reports from being used in civil trials. The *Krizak* court applied the state law of privilege, but allowed the accident report on other grounds. The *Krizak* opinion noted, however, that "probably the majority of federal courts have applied state statutorily created privileges, at least in diversity cases." *Id.* at 43 n.3 (citing cases). In an extremely thoughtful and well-reasoned decision, *Lora v. Board of Education*, 74 F.R.D. 565 (E.D. N.Y. 1977) (hereinafter "*Lora*"), Judge Weinstein recognized that the State of New York afforded protection to psychiatrist-patient communications through a state law. Recognizing that in any given instance the special federal interest in seeking the truth in a federal question case may require disclosure despite the existence of a state rule, Judge Weinstein observed:

> [W]e acknowledge that "a strong policy of comity between state and federal sovereignties

> compels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy. " [citations omitted] *If the state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule.*

Lora, 774 F.R.D. at 576 (emphasis supplied).

There is a second and equally compelling line of cases which demonstrates that the results in a lawsuit should not be different simply because this case is in federal court as opposed to state court. *See, e.g., Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). As Justice Marshall noted in the *Walker, supra*, case:

> There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants.

Walker, supra, at 753. A careful analysis of those cases further discloses that the mere denomination of the rule of law as "substantive" or "procedural" is not determinative. A considered reflection of these cases clearly reveals a federal policy that forum shopping is not to be allowed, and that the outcome of litigation should be the same no matter whether the plaintiff has selected a state or federal forum.

6. *Lora and a Consideration of the Policy Questions in This Case*

In *Lora*, it was alleged that a school district's standards for identification and educational placement of emotionally handicapped children were applied in an arbitrary and racially discriminatory manner. Plaintiff sought an order compelling production of fifty randomly selected, anonymous files. Judge Weinstein went through a thoughtful and well-reasoned process to ultimately allow disclosure of certain limited information. Recognize that in *Lora* the whole issue in the case was the method by which information in this file was used to place the emotionally handicapped children. That is not true in the case at bar, where the petitioner Galanos' emotional or mental state is not at issue. *Lora* addresses the constitutional nature of these privacy claims, *Id.* at 569, emphasizing that what a psychiatric patient confides to his therapist is never expected to be revealed to the world. *Id.* at 571. There is a further discussion of why it is so important to afford comity to the legislative policy of the state. *Id.* at 575-576. Finally, and a vital distinguishing factor from the outcome of *Lora* and this case, Judge Weinstein noted that a crucial element of the privilege is intent. If the patient makes a communication expecting it to be disclosed, there is no privilege. It was clear to Judge Weinstein in *Lora* that there was no such intent that the communication remain confidential, and that there was no reasonable expectation that the information would not be disclosed. *Id.* at 585.

Finally, the most often quoted language of any case in the decisions which specifically address this issue is found in *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955):

> In regard to mental patients, the policy behind such a statute [affording a privilege] is particularly clear and strong. Many physical ailments might be treated with some

> degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say - and all that the psychiatrist learns from what they say - may be revealed to the whole world on a witness stand."

Quoting Guttmacher and Weihofen, *Psychiatry and the Law* 272 (1952). An examination of *Lora* (cited with approval by the Eleventh Circuit in *Matter of International Horizons, Inc.*, 689 F.2d 996 (11th Cir. 1982)) and *Taylor* (just quoted) points out the deficiencies in the Eleventh Circuit's decision in *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), which will be further distinguished later in this petition. As noted by the Sixth Circuit in *In re Zuniga*, 714 F.2d 632, 638 (6th Cir.) *cert. denied* 464 U.S. 983 (1983), the *Lindstrom* opinion simply equated the psychotherapist privilege with the physician-patient privilege "without analyzing the unique aspects of the psychotherapist-patient relationship."

7. ***The Magistrate's Order is not well-reasoned.***

The District Judge denied the motion to quash, based on the Recommendation of the Magistrate. That Recommendation is set forth in App. D, *infra* 32a-34a. This portion of the petition will discuss why that Recommendation does not accurately represent the controlling law. The Recommendation cites six cases in support of allowing the psychiatrist's deposition to proceed. None of these six cases is on point or appropriate authority for the propositions advanced.

The case of *Trammel v. United States*, 445 U.S. 40 (1980), is cited for the proposition that federal courts generally restrictively recognize testimonial privileges. While that quotation is indeed on page 50 of the opinion, the remainder of the opinion is supportive of the proposition advanced by petitioner. Contrary to the emerging evolution of the psychotherapist-patient privilege, the privilege in *Trammel*, spousal testimony, had medieval origins. *Id.* at 44. This is to be contrasted to the emerging development of the necessity in according confidentiality to psychotherapist-patient communications. Consistent with this idea is the Court's note that Congress manifested an intention "not to freeze the law of privilege," but rather to " provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." *Id.* at 47. The privileges between priests and penitent, attorney and client, and *physician and patient* limit protection to private communications, the Court noted, and these privileges "are rooted in the imperative need for confidence and trust." *Id.* at 51. The marital testimonial under examination in *Trammel*, the Court continued, "stands in marked contrast to these three privileges." *Id.* Accordingly, while you will find the statement cited by the Magistrate in the *Trammel* opinion, the decision in its entirety actually emphasizes the importance of confidential physician-patient communications.

Further, three cases are cited for the proposition that the federal common law has not recognized a general physician-patient privilege. However, each of those cases addressed a *criminal case*, clearly not relevant to the civil case at bar. In *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), the Court based its opinion that certain psychiatric testimony must be disclosed on the sixth amendment right of confrontation of witnesses in a criminal case. *Id.* at 1159, 1163.

The second case cited by the Magistrate, *United States v. Meagher*, 531 F.2d 752 (5th Cir.) *cert. denied* 429 U.S. 853 (1976), addressed a *criminal case* where the defendant claimed innocence by reason of insanity. By doing so, it is clear that the defendant placed his mental capacity at issue, and accordingly *Meagher* does not give guidance for this civil case where petitioner has *not* placed his mental or emotional condition at issue.

Finally, *United States v. Harper*, 450 F.2d 1032 (5th Cir. 1971), also addressed a case where the criminal defendant claimed innocence by reason of insanity, and further, sought to prevent the disclosure of a court-ordered examination. *Harper*, therefore, likewise, affords no guidance in a civil suit such as this.

Another case, *American Civil Liberties Union of Mississippi, Inc. v. Finch*, 638 F.2d 1336 (5th Cir. 1981), addressed a case wherein a government agency claimed privilege based on a state code. The privilege was held not applicable because, first, the files sought to be produced were created before enactment of the code affording confidentiality. *Id.* at 1344. Second, the files in question were open to all members of the Mississippi Legislature. *Id.* Finally, and of most importance, there was no indication that disclosure of the files for a now-defunct state agency would hamper current or future government operations – the only possible justification for privilege.

Id. It was on these specified bases that the court found the privilege created by this state statute inapplicable. These grounds do not apply to the case at bar.

The Recommendation asserted that the majority of federal decisions appear to reject the psychotherapist privilege, *citing In re Doe*, 711 F.2d 1187, 1193 (2d. Cir. 1983). That is a misleading citation because you will find that the court in *Doe* noted that the trial judge's *in camera* examination of the patient files in question disclosed there were no communications in the files of the intensely personal nature so that the psychotherapist-patient privilege should apply.

Moreover, the Recommendation asserted that the majority of federal decisions appear to reject the psychotherapist privilege, citing *Doe*. By contrast, consider the following:

> The special need for the privilege in psychotherapy treatment is long recognized and widely supported by Courts and commentators.

Mutual of Omaha Insurance Co. v. American National Bank and Trust Co., 610 F.Supp. 546, 548-49 (D. Minn. 1985) (citations omitted). In fact, in *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955), the court refused to allow the testimony of a psychotherapist, applying a District of Columbia statute, even though the criminal defendant in that case asserted his mental or emotional status as a defense. Further, statements that "the physician-patient privilege, founded in state statute, has been honored in most jurisdictions" are found in cases. *Mariner v. Great Lakes Dredge & Dock Co.*, 202 F.Supp. 430, 433 (N.D. Ohio 1962) (citing cases). There is also a decision of this Court admittedly predating *Erie*, *Connecticut Mutual Life Insurance Co. v. Union Trust Co.*, 112 U.S. 250 (1884), wherein this Court

upheld the application of a New York State law which prevented a physician from disclosing any information he acquired in attending a patient, in a professional capacity. As Judge Weinstein noted, psychotherapists and courts "share a general consensus that, because of the uniquely personal nature of mental and emotional therapy, accurate diagnosis and effective treatment require an environment of confidentiality." *Lora*, 74 F.R.D. at 571 (citing authority).

In sum, it is submitted that there are extremely important policy positions which must be considered in the context of a civil case, which were not addressed in the criminal cases discussed by the Recommendation accepted by the Trial Judge and the Eleventh Circuit.

8. ***An Appropriate Protective Order***

A review of the Recommendation accepted by the Trial Judge would lead one to the conclusion that the simple assertion there is no privilege answers the question and the information must then be disclosed. That is not correct. As noted in *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545, 1548 (11th Cir. 1985):

> Rule 26(c) gives the district court discretionary power to fashion a protective order. The decision does not depend on a legal privilege.

In *Farnsworth*, a tampon manufacturer sought information from the Center for Disease Control with regard to names and addresses of women who participated in research. While recognizing that the information was certainly relevant and could be of significance to the tampon manufacturer's trial preparation and defense, the trial judge nonetheless withheld certain information. This was true even though there was no express guaranty of confidentiality from the participants in the survey. *Id.* at 1547. That is a stark contrast to

the expectation of confidentiality which a patient seeks from his psychotherapist. As even the cases cited in this petition note, psychotherapy depends on absolute confidence that treatment shall remain private. A protective order should have been granted.

CONCLUSION

Congress and the State of Alabama provided a cloak of secrecy to communications between petitioner and his psychiatrist. Petitioner did not inject his mental condition into this litigation, and indeed, it does not even bear on the issues as framed by plaintiff. Petitioner is entitled to insist upon protection of his constitutional rights from unwarranted governmental intrusion. While it would be tempting for this Court to discard this petition as a mere discovery dispute, such a refusal to enforce the federal and state privilege against disclosure would run counter to an emerging encouragement of treatment for chemical or alcohol abuse. This decision would have far reaching ramifications. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF ALABAMA SOUTHERN DIVISION

CASE NO. 84-0951-C

WILLIAM H. McGILL,

Plaintiff,

versus

CITY OF MOBILE, a municipal corporation, WINSTON J. ORR, LESTER HARGROVE, CHARLES S. SUMMERS, BERNARD HENEBRY, ROBERT P. LARISON, and CHRIS N. GALANOS,

Defendants.

Filed August 14, 1984

FIRST CAUSE OF ACTION

I.

This is a Civil Rights suit brought under 42 U.S.C. Section 1983 and 1985. From July 6, 1971 through October 18, 1983, the Plaintiff was at all times a policeman employed by the Police Department of the Defendant City of Mobile. The Defendant City of Mobile, a municipal corporation (herein referred to "City of Mobile") was at all times a municipality located within the State of Alabama and as such was an arm or agency of the State of Alabama. The Defendant Winston J. Orr (herein referred to as "Orr") was at all times relevant hereto the Chief of Police of the City of Mobile and was Plaintiff's ultimate superior within the Mobile Police Department,

the Plaintiff's place of employment. The Defendant Orr was at all times relevant hereto acting as an agent, servant, or employee of the City of Mobile and is sued both in his individual capacity and in his official capacity as a Police Chief of the City of Mobile. The Defendant Charles S. Summers was at all times acting as an agent, servant or employee of the Defendant City of Mobile as a Captain in the Patrol Division of the Mobile Police Department and is sued here individually and in his official capacity as a Captain in the Police Department of the City of Mobile. The Defendant Bernard Henebry was at all times acting as an agent, servant or employee of the Defendant City of Mobile and is here sued in his individual capacity as well as in his official capacity as a Major of the Defendant City of Mobile's Police Department. The Defendant Robert P. Larison was at all times acting as an agent, servant or employee of the Defendant City of Mobile and is here sued individually as well as in his official capacity as a Chief and Assistant Chief of the Mobile Police Department. The Defendant Chris N. Galanos (herein referred to as "Galanos") was at all times relevant hereto the District Attorney for Mobile County, Alabama. The Defendant Galanos is sued individually and in his official capacity as District Attorney of Mobile County, Alabama.

Jurisdiction of this cause is under Title 28 U.S.C. Section 1331 and 1343.

II.

On the night of September 7, 1983, while the Plaintiff was carrying on routine patrol duty in his capacity as a police officer of the City of Mobile, he arrested the Defendant Galanos on a charge of driving an automobile under the influence of a substance which impaired his mental or physical faculties to a degree which rendered him incapable of safely driving. The arrest of the Defendant Galanos was pursuant to

the Plaintiff's sworn legal duty to arrest persons who commit crimes in the presence of a police officer. Subsequent to the arrest of the Defendant Galanos by the Plaintiff, the Plaintiff, pursuant to his legal duties, attempted to process the arrest by signing a warrant against the Defendant Galanos charging him with the crime for which he was arrested, to-wit, DUI. The Defendants, individually, and pursuant to a conspiracy among themselves, thwarted and prevented the Plaintiff from processing the arrest, signing a warrant against the Defendant Galanos and performing his legal duties in and about the prosecution of such warrant. The Defendants' activities included causing the Plaintiff to be dismissed from his employment with the City of Mobile Police Department. The Plaintiff alleges that the actions of the Defendants, individually and collectively, in a conspiracy continued from the day after the Defendant Galanos' arrest, to-wit, September 8, 1983, when the Defendants Galanos and Orr met concerning Galanos' arrest and continued to October 18, 1983, when the Plaintiff's dismissal became final. The Defendants' activities were directed toward pressuring the Plaintiff into not prosecuting Galanos and retaliating against the Plaintiff for making the arrest and attempting to prosecute it.

III.

As a public employee and as a citizen of the United States the Plaintiff McGill, at all times relevant hereto, was protected by the First and Fourteenth Amendments to the Constitution of the United States. Under the First Amendment to the Constitution of the United States the Plaintiff had a constitutional right to exercise free speech. Under the First Amendment to the Constitution of the United States the Plaintiff could not be punished or retaliated against by the Defendants for his exercise of free speech. Not only was the Plaintiff's exercise of free speech protected by the First Amendment in and of itself, the Plaintiff was also protected by various

State of Alabama Statutes which prohibited the Defendants from obstructing justice or otherwise interfering with a police officer, such as McGill, in carrying out of his duties under the law. Specifically, Title 13A, Section 13A-6-25 Code of Alabama 1975, entitled "Criminal Coercion" prohibits any person from damaging the property or reputation of another "with intent thereby to induce the threatened person or another against his will to . . . refrain from doing a lawful act". The Plaintiff alleges that the prosecution of the Defendant Galanos was the doing of a lawful act under said statute. Title 13A, Section 13A-10-23(a) Code of Alabama 1975, entitled "Intimidating a Witness" prohibits any person from "by use of a threat directed to a witness or a person he believes will be called as a witness in any official proceedings to: (1) corruptly influence the testimony of that person;".

The Plaintiff alleges that the Plaintiff was exercising his protected right of free speech under the First Amendment by arresting Galanos, by attempting to prosecute Galanos including the offering of testimony in the form of a sworn affidavit. Plaintiff's attempt to exercise his right of free speech was a substantial or motivating cause of the Plaintiff's dismissal from his public employment as a police officer of the Defendant City of Mobile. The Plaintiff claims damages from the Defendants, separately and severally, under 42 U.S.C. Section 1983, for the violation of his right of free speech under the First Amendment to the Constitution of the United States. The Plaintiff claims damages against the Defendants under 42 U.S.C. Section 1985(2) providing, inter alia, a cause of action against any two or more persons who "conspire for the purpose of impeding, hindering, or obstructing, or defeating, in any manner, the due course of justice in any State . . . , with intent to deny any citizen equal protection of the laws, ..." The Plaintiff alleges specifically, that the Defendants conspired among themselves to deny the Plaintiff individually, and as a member of the class of persons

within the Mobile Police Department protected by the statutes cited above, equal protection of the laws which permitted and required the Plaintiff to prosecute anyone for the commission of a criminal offense in his presence. Plaintiff alleges that the conspiracy to retaliate against Plaintiff for performing his legal duty will have a chilling effect upon other members of the Plaintiff's class in the exercise of their right of free speech.

IV.

The Plaintiff prays that this Court will award to the Plaintiff compensatory damages, including damages for lost past and future wages, mental distress, humiliation, and interest on lost wages. The Plaintiff further prays that this Court will award to the Plaintiff punitive damages to punish the Defendants, and in this regard alleges that the Defendants' conduct was motivated by evil motive or intent or involved reckless or callous indifference to federally-protected rights. The Plaintiff claims a reasonable attorney's fee and costs.

The Plaintiff further prays that upon the hearing of this cause this Court will issue a permanent injunction against the Defendants from enforcing the Plaintiff's dismissal from the Mobile Police Department and ordering that the Plaintiff be reinstated in good standing to his previous position with the Mobile Police Department and will further order that the dismissal of the Plaintiff and anything pertaining thereto be expunged from the Plaintiff's employment record.

WHEREFORE, the Plaintiff demands Judgement against the Defendants separately and severally, in the amount of $5,000,000.00.

SECOND CAUSE OF ACTION

I.

The Plaintiff incorporates herein all the allegations of paragraphs I through IV of the First Cause of Action.

II.

At all times relevant hereto, the Plaintiff's employment with the Defendant City of Mobile's Police Department constituted a property right. The Plaintiff alleges that under the Fourteenth Amendment to the Constitution of the United States the Defendants could not deprive the Plaintiff of this property right without due process of law. The Plaintiff alleges that the Defendants individually, and in a conspiracy among themselves, did deprive the Plaintiff of his property right in his public employment with the Defendant City of Mobile's Police Department without due process of law. Specifically, the Plaintiff alleges that although the substantial and motivating reason for the Plaintiff's termination as an employee of the City of Mobile Police Department was the Plaintiff's performance of his right and duty to arrest, prosecute, and testify against the Defendant Galanos for a DUI occurring in Plaintiff's presence on September 7, 1983, the Defendants expressly denied the Plaintiff a due process hearing on his dismissal as a result of said September 7, 1983 incident involving the Defendant Galanos' arrest.

III.

The Plaintiff prays that this Court will award to the Plaintiff compensatory damages, including damages for lost past and future wages, mental distress, humiliation, and interest on lost wages. The Plaintiff further prays that this Court will award to the Plaintiff punitive damages to punish

the Defendants, and in this regard alleges that the Defendants' conduct was motivated by evil motive or intent or involved reckless or callous indifference to federally-protected rights. The Plaintiff claims a reasonable attorney's fee and costs.

The Plaintiff further prays that upon the hearing of this cause the Court will issue a permanent injunction against the Defendants from enforcing the Plaintiff's dismissal from the Mobile Police Department and ordering that the Plaintiff be reinstated in good standing to his previous position with the Mobile Police Department and will further order that the dismissal of the Plaintiff and anything pertaining thereto be expunged from the Plaintiff's employment record.

WHEREFORE, the Plaintiff demands Judgement against the Defendants separately and severally in the amount of $5,000,000.00.

THIRD CAUSE OF ACTION

I.

The Plaintiff incorporates herein all the allegations of paragraphs I through IV of the First Cause of Action.

II.

At all times relevant hereto the Plaintiff was protected by the due process clause of the Fourteenth Amendment to the Constitution of the United States which prohibited the Defendants from denying the Plaintiff his liberty without due process of law. The Plaintiff alleges that the Defendants, individually, and in a conspiracy with each other, denied the Plaintiff his liberty by causing him to be dismissed from the City of Mobile Police Department on October 18, 1983, for exercising or attempting to exercise his legal duty in

prosecuting and testifying against the Defendant Galanos for a DUI occurring on September 7, 1983. Specifically, the Plaintiff alleges that the Plaintiff's dismissal from the City of Mobile Police Department permanently injured and damaged the Plaintiff's good name, reputation, honor and integrity by dismissing him from the Police Department for conduct unbecoming a police officer. Said dismissal of the Plaintiff permanently damaged and adversely affected his present and future employment opportunities as a policeman, not only with the Defendant City of Mobile but with any other law enforcement agency.

III.

The Plaintiff prays that this Court will award to the Plaintiff compensatory damages, including damages for lost past and future wages, mental distress, humiliation, and interest on lost wages. The Plaintiff further prays that this Court will award to the Plaintiff punitive damages to punish the Defendants, and in this regard alleges that the Defendants' conduct was motivated by evil motive or intent or involved reckless or callous indifference to federally-protected rights. Plaintiff claims a reasonable attorney's fee and costs.

The Plaintiff further prays that upon the hearing of this cause this Court will issue a permanent injunction against the Defendants from enforcing the Plaintiff's dismissal from the Mobile Police Department and ordering that the Plaintiff be reinstated in good standing to his previous position with the Mobile Police Department and will further order that the dismissal of the Plaintiff and anything pertaining thereto be expunged from the Plaintiff's employment record.

WHEREFORE, the Plaintiff demands Judgement against the Defendants separately and severally in the amount of $5,000,000.00.

FOURTH CAUSE OF ACTION

I.

The Plaintiff incorporates herein all the allegations of paragraphs I through IV of the First Cause of Action.

II.

From the period of September 8, 1983 through the Plaintiff's termination by the Defendant City of Mobile October 18, 1983, the Defendants, willfully, or so recklessly as to equate to willfulness and by their extreme and outrageous conduct in attempting to and terminating the Plaintiff for his exercise of his constitutional right of free speech, did intentionally or recklessly cause severe emotional distress to the Plaintiff by having him wrongfully dismissed from the Mobile Police Department and permanently damaging the Plaintiff's good name and reputation.

III.

The Plaintiff prays that this Court will award to the Plaintiff compensatory damages and punitive damages suffered by the Plaintiff by virtue of the Defendants' commission of the tort of outrage.

WHEREFORE, the Plaintiff demands Judgement against the Defendants in the amount of $5,000,000.00.

FIFTH CAUSE OF ACTION

I.

The Plaintiff incorporates herein all the allegations of paragraph I through IV of the First Cause of Action.

II.

The Plaintiff alleges that from September 8, 1983, through October 18, 1983, all of the Defendants other than the Defendant City of Mobile intentionally and willfully interfered with the Plaintiff's employment with the Defendant City of Mobile by causing the Plaintiff to be terminated from his employment for exercising his right of free speech under the First Amendment to the Constitution of the United States in attempting to prosecute the Defendant Galanos for a DUI charge occurring on September 7, 1983.

III.

The Plaintiff prays that the Court will award to the Plaintiff damages for the intentional interference by the Defendants other than the City of Mobile with the Plaintiff's employment with the City of Mobile and will award to the Plaintiff compensatory damages including lost wages and future lost wages.

WHEREFORE, the Plaintiff demands Judgement against all Defendants other than the City of Mobile in the amount of $5,000,000.00 including compensatory and punitive damages.

Dated this 14 day of August, 1984.

KILBORN & GIBNEY
Post Office Box 1904
Mobile, Alabama 36633

/s/ VINCENT F. KILBORN III
VINCENT F. KILBORN III

PLAINTIFF RESPECTFULLY DEMANDS TRIAL BY JURY

The Defendants may be served at the following addresses:

The City of Mobile
City Hall
111 S. Royal Street
Mobile, Alabama 36602

Winston J. Orr
Lester Hargrove
Charles S. Summers
Bernard Henebry
Robert P. Larison
Mobile Police Department
51 Government Street
Mobile, Alabama 36602

Chris N. Galanos
Mobile County Courthouse
Government Street
Mobile, Alabama 36602

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

84-0951-C-S

WILLIAM H. McGILL ,

Plaintiff,

versus

CITY OF MOBILE, et al.,

Defendants.

PRE-TRIAL ORDER

A pre-trial conference was held in this case on the 23rd day of April, 1986, pursuant to Rule 16 of the Federal Rules of Civil Procedure, as a result of which the following proceedings were held and action was taken:

1. **Jurisdiction**.

Plaintiff claims jurisdiction pursuant to 28 U.S.C. §§1331 and 1343. By Order of this Court dated September 13, 1985 this Court denied the Defendant City of Mobile's Motion for Summary Judgment based upon collateral estoppel or *res judicata* under 28 U.S.C. §1738. See, Recommendation of Magistrate dated December 20, 1984. By Order of this Court dated September 12, 1985 this Court denied Defendant Galanos' Motion to Dismiss on the basis of prosecutorial immunity. See, Recommendation of Magistrate dated December 20, 1984.

Defendants deny that this Court has jurisdiction pursuant to those code sections for the reason that there is no 42 U.S.C. § 1983 cognizable cause of action, and plaintiff has no direct action under the Constitution.

2. **Parties and Trial Counsel.**

The parties before the court are correctly named as set out below and the designated trial counsel are set out below:

Plaintiff William H. McGill - Vincent F. Kilborn, III;

Defendants, City of Mobile, Winston J. Orr, Lester Hargrove and Charles S. Summers - Roderick P. Stout and James B. Rossler;

(Defendants Bernard Henebry and Robert P. Larison are deceased and have been dismissed pursuant to Rule 25);

Defendant, Chris N. Galanos - Davis Carr.

3. **Pleadings.**

The following pleadings (with modifications contained in this order) have been allowed:

Complaint;

Answer of Defendants, City of Mobile, Winston J. Orr, Lester Hargrove, Charles S. Summers; and

Answer of Chris N. Galanos.

4. **Agreed Facts.**

The following facts are established by admissions in the pleadings of stipulation of all parties:

1. From July 6, 1971 through October 8, 1983, McGill was at all times a policeman employed by the police department of the City of Mobile.

2. The City of Mobile is a municipal corporation and at all times was a municipality located within the State of Alabama.

3. Winston J. Orr was at all times relevant hereto the Chief of Police of the City of Mobile and was plaintiff's ultimate superior within the Mobile Police Department, plaintiff's place of employment.

4. Orr was at all times relevant hereto acting as an agent, servant, or employee of the City of Mobile.

5. Charles S. Summers was at all times acting as an agent, servant, or employee of the City of Mobile as a Captain in the Patrol Division of the Mobile Police Department.

6. Bernard Henebry and Robert P. Larison were originally sued in the complaint, but have died and no substitution has been filed. Hence, they are no longer parties to this litigation.

7. Lester Hargrove was at all times acting as an agent, servant or employee of the City of Mobile as a Sergeant of the Mobile Police Department.

8. Chris N. Galanos was at all times relevant hereto the District Attorney for Mobile County, Alabama.

9. On the night of September 7, 1983, while plaintiff was on patrol duty, he detained Galanos. The next morning plaintiff attempted to obtain a warrant for the arrest of Galanos.

10. *September 9, 1983*: Orr sent plaintiff a pre-disciplinary action notice, regarding the contemplated disciplinary action of dismissal for plaintiff for reasons set forth in the notice. A Bench Book is filed herewith for convenience of the Court, and a copy of this notice is in the Bench Book denominated Exhibit 1. The disciplinary hearing was scheduled for September 10, 1983 at 5:05 p.m.

11. *September 9, 1983*: Hargrove, as Sergeant of the Internal Affairs Division, wrote Orr regarding the Hammac incident. Bench Book Exhibit 2.

12. *September 9, 1983*: Summers, Henebry and Larison wrote Orr recommending the termination of plaintiff. Bench Book Exhibit 3.

13. *September 12, 1983*: Orr wrote Mayor Doyle, concurring in the recommendation of Summers, Henebry and Larison to terminate plaintiff. Bench Book Exhibit 4.

14. By letter dated September 12, 1983, Mayor Doyle on behalf of the City Commission wrote a letter of termination to the plaintiff which included the Galanos incident. Bench Book Exhibit 5.

15. *September 12, 1983*: Mike Rowland, as Corporal of the Internal Affairs Division wrote Orr regarding Internal Affairs' investigation of the Galanos matter. Bench Book Exhibit 6.

16. *September 13, 1983*: Hargrove, as Sergeant of the Internal Affairs Division, wrote Orr regarding the K-Mart incident. Bench Book Exhibit 7.

17. *September 13, 1983*: Sergeant James West of the Internal Affairs Division wrote Orr regarding the K-Mart, Hammac and Galanos matters. Bench Book Exhibit 8.

18. *September 13, 1983*: Mayor Doyle on behalf of the City Commission wrote plaintiff, terminating his employment effective September 13, 1983. Bench Book Exhibit 9.

19. *October 7, 1983*: Mayor Doyle on behalf of the City Commission wrote plaintiff, rescinding plaintiff's termination of September 13, and providing a pre-disciplinary action notice. A copy of this notice went to plaintiff's attorney, Lee L. Hale. Plaintiff was notified of the proposed disciplinary action, and the proposed reasons for that action. The pre-disciplinary hearing was

noticed for October 11, 1983 at 3:00 p.m. Bench Book Exhibit 10.

5. **Plaintiff's Theories of Recovery.**

1. The First Cause of Action alleges that McGill's right to prosecute the Defendant Galanos for a crime committed in his presence, including the right to sign a warrant and testify in pursuit of the warrant, was violated by the Defendants' firing of the Plaintiff. This right was protected by the First and Fourteenth Amendment to the Constitution of the United States under the right of free speech. Under the First Amendment, McGill could not be punished or retaliated against by the Defendants for his exercise or threaten to exercise of free speech. The Complaint also alleges that not only was the Plaintiff's exercise of free speech protected by the First Amendment but the Plaintiff was also protected by various State Statutes which prohibited the Defendants from obstructing justice or otherwise interfering with a police officer such as McGill in the carrying out of his duties. McGill's attempt to exercise his right of free speech was a substantial and motivating cause of his dismissal from his public employment as a police officer. Damages are claimed under 42 U.S.C. §1985(2), which provides a cause of action against two or more persons who "conspire for the purpose of impeding, hindering, or obstructing, or defeating, in any manner, the due course of justice in any state . . . , with intent to deny any citizen equal protection of the laws . . . ."

2. The Second Cause of Action alleges that the Plaintiff was denied a property right in his public employment without due process of law in violation of 28 U.S.C. §1983.

3. The Third Cause of Action alleges that the Plaintiff was deprived of his liberty interest without due process of law and that the Plaintiff was terminated for attempting to

prosecute the Defendant Galanos all in violation of 28 U.S.C. §1983.

4. The Fourth Cause of Action alleges the Tort of Outrage in that the Defendants willfully, and by their extreme and outrageous conduct attempted to terminate Plaintiff for his exercise of his Constitutional right to free speech.

5. The Fifth Cause of Action alleges an intentional interference with the Plaintiff's employment.

6. The Plaintiff does not contend that race was a factor in Plaintiff's termination.

7. By Order of September 13, 1985 the Court has already ruled that 28 U.S.C. §1738 does not bar this lawsuit.

8. The Defendant Galanos does not have prosecutorial immunity in that although the Defendant Galanos was the District Attorney of Mobile County at the time, his actions were not within the scope of his duties as prosecutor but were rather in the nature of an abuse of his prosecutorial position by using it for personal benefit. See, this Court's Order dated September 12, 1985 and Recommendation of Magistrate dated December 20, 1984.

6. **Plaintiff's Contentions.**

1. On the night of September 7, 1983, McGill attempted to arrest and prosecute Galanos for DUI.

2. On the following morning September 8, 1983 (within twelve hours) Galanos was in the Chief of Police Winston Orr's office wanting the Internal Affairs investigation and McGill fired.

3. Within thirty-six hours of the attempted arrest and on September 9, 1983, McGill received his Notice of Pre-Disciplinary Hearing with the Galanos Incident being one of three incidents mentioned.

4. The Notice falsely stated that the Galanos complaint had been fully investigated and found to be sustained when in fact the investigation had just begun. The Notice falsely stated the K-Mart and Hammac incidents had been fully investigated.

5. On September 10, 1983, the Pre-Disciplinary Hearing was held and the complaints against McGill including the Galanos, K-Mart and Hammac incidents were sustained.

6. On September 12, 1983 Mike Rowland, the investigating officer for the Department of Internal Affairs, wrote Winston Orr to the effect that the Galanos arrest incident was not justification for firing McGill, Rowland having found that McGill had acted properly.

7. On September 12, 1983, Orr wrote Police Commissioner Robert Doyle stating that the September 10, 1983 Pre-Disciplinary Hearing had been held and that the complaints against Officer McGill – the Galanos, K-Mart, and Hammac incidents – had been sustained and recommended that McGill be fired.

8. September 13, 1983, McGill received his letter of termination based upon the September 10, 1983 Pre-Disciplinary Hearing with the K-Mart and Hammac incidents included but the Galanos incident conspicuously left out.

9. Galanos wanted McGill terminated or disciplined because as the Grand Jury found he mistakenly thought McGill was part of some great conspiracy to discredit him with regard to the Auditorium investigation.

10. Chief Orr and Galanos put pressure on Rowland to sustain Galanos' complaint and have McGill fired.

11. McGill was terminated because Galanos wanted McGill terminated even though the Galanos Incident was omitted from McGill's September 13, 1983 Termination Letter.

12. Mobile Police Department through Chief Orr prohibited McGill from signing a warrant against Galanos and specifically informed him not to sign a warrant and not to say anything to the Alabama Attorney General Charles Graddick about the incident.

13. The Defendant Galanos was in fact using drugs, probably Dexedrine, on the night of September 7, 1983. The Defendant has been treated extensively in the past for drug abuse and the Defendant's DUI charge for which the Mobile County Grand Jury indicted Galanos was settled on an agreement that the DUI charge would be dismissed in return for Galanos obtaining treatment for his drug abuse.

14. The City of Mobile's second termination of McGill October 18, 1983 was a reenactment of the first termination because of "mistakes" made by the City in the first termination letter. McGill's September 13, 1983 hearing was so fraught with violations of due process of law and free speech that the City legal department recommended to the Defendant City that the termination be rescinded and that a second more sanitized version be held.

15. Commissioner Greenough refused to go along with the second termination because the Galanos Incident was obviously the reason for McGill's termination even though the second termination did not state it.

16. Regardless of the validity of any other complaints by the City of Mobile against Officer McGill, the Galanos Incident was the straw that broke the camel's back resulting in McGill being terminated. It is not necessary for a Plaintiff in a §1983 case to prove that the protected conduct was the "sole motive" for the termination. It is only necessary that the Plaintiff prove that a "substantial" or "motivating" factor in his termination was the protected conduct.

17. A special Mobile County Grand Jury exonerated McGill by (a) indicting Galanos as a result of the September 7, 1983 incident, (b) finding that McGill was not a part of any conspiracy as alleged by Galanos, and (c) exonerating McGill's attempt to arrest Galanos. This proves McGill's course of action in arresting and trying to prosecute Galanos was correct and the interference with it was improper.

18. The Plaintiff's protected activities were (1) free speech, and (2) a property right and liberty interest in his employment. The evidence is clear that the Galanos Incident was a motivating reason for McGill's dismissal and thus, violation of his protected interest. Mike Rowland, the Internal Affairs Investigating Officer, of the Galanos complaint will testify that he was pressured by the Defendant Orr to sustain the Galanos complaint, that McGill was terminated because Galanos wanted him terminated, and Galanos' motivation for all of this was his paranoia about a phantom conspiracy.

19. The Defendants violated the Plaintiff's due process rights in that the Defendants' conduct in firing the Plaintiff was arbitrary, unreasonable and capricious.

20. The Plaintiff's theories of recovery are more fully stated in the Plaintiff's briefs filed January 24, 1986, November 13, 1984 and September 12, 1984.

21. The Plaintiff's claim is not precluded under 28 U.S.C. §1738 as per the facts set out in the Magistrate's December 20, 1984 Recommendation on this point. As noted by the Magistrate (a) Mobile County Personnel Board specifically noted that it made no decision based upon the incident, (b) the Personnel Board upon the City's insistence specifically refused to allow the Plaintiff to present evidence on the incident, (c) the Defendants' retaliatory motivation arising from the incident was not an issue litigated in the Personnel Board action, (d) the Personnel Board is not a Defendant here, and (e) the Defendants brought the charges to the Personnel Board in the first instance for retaliatory purposes.

7. **Defenses.**

1. Plaintiff has no first amendment right to arrest anyone.

2. The Galanos matter was not a factor in the decision to terminate plaintiff.

3. There is no racially discriminatory animus.

4. Res judicata or collateral estoppel bars this lawsuit (28 U.S.C. §1738).

5. Due process was afforded.

6. The matters alleged in this complaint are more properly the subject of a compulsory claim in the state court proceedings.

7. Plaintiff failed to exhaust state remedies.

8. Plaintiff fails to state a claim for any and all of his alleged theories, and specifically including a tort of outrage.

9. All defendants had good faith immunity.

10. There is no 42 U.S.C. §1983 cause of action in this case because there is no established state procedure, or custom, policy or practice which led to the deprivations of which plaintiff complains.

11. Plaintiff has no protected liberty interest.

12. With regard to the defendant Galanos, he either was not acting under color of law, or if he was, he had prosecutorial immunity.

8. **Defendants' Contentions.**

1. Defendants believe that the recitation of agreed facts supplement the defenses outlined above. Additionally, defendants have filed briefs in support of motions for summary judgment which have elaborated, at length, on these contentions. Defendants feel there is a burden on plaintiff to prove there is a first amendment right to arrest, which has not been done. There is absolutely no evidence of any racially discriminatory animus as required by 42 U.S.C. §1985.

2. It is clear that plaintiff was afforded process through the state court proceedings. Plaintiff simply is not satisfied with that process, and questions the "real" motivations.

Plaintiff was given notice, an opportunity to be heard, counseled, and the right to put on evidence. Plaintiff had a hearing before Gordon Blackwell, a hearing before the Personnel Board, and a review of that hearing by a Mobile County Circuit Judge. Plaintiff should not be entitled to re-litigate his termination.

3. There is no established state procedure, or custom policy or practice which is required to sustain a 42 U.S.C. §1983 claim.

4. With regard to Galanos, if he was acting as a private citizen and not as a District Attorney, then there is no color of law and a 1983 cause of action against him will not lie. If Galanos was acting in his capacity as District Attorney, then he had prosecutorial immunity.

9. **Witnesses**.

The parties have identified below the names and addresses of the following witnesses whose testimony can reasonably be anticipated at the trial of this action.

John Coleman, Esq.
801 Van Antwerp Building
Mobile, Alabama 36602

Ira DeMent, Esq.
Special Assistant Attorney General
Post Office Box 4163
Montgomery, Alabama 36101

Winston J. Orr
6275 Lausanne Drive North
Mobile, Alabama

Charles S. Summers
c/o Mobile Police Department
Mobile, Alabama

Lester Hargrove
c/o Mobile Police Department
Mobile, Alabama

Mike Rowland
c/o Mobile Police Department
Mobile, Alabama

James West
c/o Mobile Police Department
Mobile, Alabama

Phillip Garrett
c/o Mobile Police Department
Mobile, Alabama

Pete Hollifield
c/o Mobile Police Department
Mobile, Alabama

Mike Singleterry
c/o Mobile Police Department
Mobile, Alabama

A. E. Allen
c/o Mobile Police Department
Mobile, Alabama

John Wynne
c/o Mobile Police Department
Mobile, Alabama

Lambert C. Mims
3008 Bryant Road
Mobile, Alabama

Robert Doyle
c/o City of Mobile
Mobile, Alabama

William Garrick
c/o Mobile Police Department
Mobile, Alabama

Mr. & Mrs. Nick Galanos
5717 Knights Court
Mobile, Alabama

Mr. & Mrs. Chris Galanos
c/o Mobile County District Attorney's Office
Mobile, Alabama

Effie Diamond
Lois Helmer
c/o City of Mobile
Mobile, Alabama

Gordon Blackwell
c/o City of Mobile
Mobile, Alabama

Willie Nobles
Edith Vaughan
James K. Huffstetler
James A. McPherson
c/o Mobile Personnel Board
Mobile, Alabama

Lee L. Hale, Esq.
P. O. Box 495
Mobile, Alabama 36601

Bill Lauten
City of Mobile
Mobile, Alabama

Mylan Engle
P. O. Box 1045
Mobile, Alabama 36633

Dan Millis
c/o K-Mart
4665 Airport Boulevard
Mobile, Alabama

Barbara Curry
c/o First National Bank Overlook
Mobile, Alabama

Douglas Hammac
c/o Hammac's Garage & Wrecker Service
2730 Highpoint Boulevard
Mobile, Alabama

Robert Smith
c/o Mobile Police Department
Mobile, Alabama

Dianne Smith
c/o Mobile Police Department
Mobile, Alabama

John Phillips
c/o Mobile Police Department
Mobile, Alabama

Ronald Mair
c/o Mobile Police Department
Mobile, Alabama

Bobby Westbrook
c/o K-Mart
4665 Airport Boulevard
Mobile, Alabama

Obie Singletary
c/o Mobile Police Department
Mobile, Alabama

Shelby J. Robbins
c/o Mobile Police Department
Mobile, Alabama

Frances W. McGill
Mobile, Alabama

10. **Type of Trial.**

This is a jury trial.

11. **Standard Pre-Trial Procedures.**

The Standard Pre-Trial Procedures and any modifications thereto on exhibit "A" to this Pre-trial Order, are adopted as

part of this Order. This Pre-trial Order shall be binding on parties unless modified by further order for good cause shown.

DONE this 23rd day of April, 1986.

EMMETT R. COX
United States District Judge

VINCENT F. KILBORN, III
Attorney for Plaintiff

JAMES B. ROSSLER
Attorney for Defendant, City of Mobile, Winston J. Orr, Charles S. Summers and Lester Hargrove

/s/ DAVIS CARR
DAVIS CARR
Attorney for Defendant, Chris Galanos

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NO. 84-0951-C-S

WILLIAM H. MC GILL,

Plaintiff,

versus

CITY OF MOBILE, et al,

Defendants.

Filed November 7, 1985

MOTION TO QUASH NOTICES OF DEPOSITION

Comes now CHRIS GALANOS (Galanos), a defendant in the above styled cause, and moves the court for an order quashing the notices of deposition filed by plaintiff for the depositions of Dr. S. N. Rumpanos and Dr. William H. Rudder, said depositions being noticed for November 26, 1985, a copy of said notices being attached hereto as Exhibits A and B. As grounds therefore, Galanos says as follows:

1. Each of the deponents mentioned hereinabove are medical doctors who, prior to the occurrence made the basis of plaintiff's complaint, rendered some treatment to Galanos.

2. Other than the fact of having rendered treatment to Galanos, the deponents named have no knowledge whatsoever concerning the occurrence made the basis of plaintiff's complaint.

3. The treatment said deponents rendered to Galanos is irrelevant and immaterial to any of the issues raised by the pleadings in this action, nor will such evidence reasonably lead to any discoverable evidence and, therefore, the subject of the testimony of said deponents is beyond the scope of Rule 26, Federal Rules of Civil Procedure.

4. The sole purpose of the taking of the depositions of the two above named deponents is to harass Galanos, or cause Galanos embarassment.

5. The testimony of said physicians as to their treatment of Galanos is privileged to the extent that it constitutes psychiatric or psychological counseling.

/s/ NATHAN FRIEDLANDER
NATHAN FRIEDLANDER

OF COUNSEL:
MARR AND FRIEDLANDER, P.C.
POST OFFICE BOX 8548
MOBILE, ALABAMA 36608

CERTIFICATE OF SERVICE

I, Nathan Friedlander, hereby certify that on the 6th day of November 1985 I served the foregoing motion on counsel of record in this cause by mailing a copy by United States mail, first class postage prepaid to Vincent F. Kilborn III, Post Office Box 1904, Mobile, Alabama 36633; Roderick P. Stout, Post Office Box 2214, Mobile, Alabama 36652; and, William A. Kimbrough, Jr., Post Office Box 2821, Mobile, Alabama 36652.

/s/ NATHAN FRIEDLANDER
NATHAN FRIEDLANDER

Attachments: Exhibits A & B

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 84-0951-C-S

WILLIAM H. McGILL,

Plaintiff,

versus

CITY OF MOBILE, et al,

Defendants.

ORDER

The motion of Plaintiff to compel document production from Defendant Galanos is DENIED. Defendant has filed a response stating that he is not in possession of the requested documents. Though the obligation to produce under Rule 34 extends to documents within the control of the party, there is no basis in the record for the conclusion that Defendant in fact controls the disposition of the documents.

The motions to compel testimony from deponents Drs. William H. Rudder and Socrates N. Rumpanos are GRANTED.

This is an action brought under 42 U.S.C. §§1983 and 1985. The controlling substantive legal principles are established by federal law. Privilege, therefore, is governed by the first sentence of Rule 501, FED.R.EVID., which makes privilege a matter of federal common law. Inasmuch as the second sentence of Rule 501 is not applicable, Alabama's privilege rules do not control, though they may be a useful

reference in determining what privileges the common law provides.

The federal courts have generally been quite restrictive in recognizing testimonial privileges. *See Trammel v. United States*, 445 U.S. 40, 50 (1980); *American Civil Liberties Union of Mississippi v. Finch*, 638 F.2d 1336, 1344 (5th Cir. 1981). The federal common law has not recognized a general physician-patient privilege. *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983); *United States v. Meagher*, 531 F.2d 752 (5th Cir. 1976); *United States v. Harper*, 450 F.2d 1032 (5th Cir. 1971). There is no compelling reason shown in this case to deviate from that authority and create a general physician-patient privilege.

The precise issue in this case relates to a physician's testimony regarding treatment of a claimed drug dependency and his prescription of controlled substances. The claimed privilege is therefore akin to that which would have been recognized in proposed Evidence Rule 504, which was not enacted by Congress. The majority of federal decisions appear to reject the "psychotherapist privilege" which would have been created by proposed Rule 504. *See In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983), and cases cited therein. In *United States v. Lindstrom*, *supra*, and *United States v. Meagher*, *supra*, the Courts declined to recognize a privilege in "psychotherapist" contexts. The Magistrate finds no basis for a claim of federal common law privilege here.

The testimony of Drs. Rudder and Rumpanos pursuant to this Order shall be subject to the same confidentiality requirements set forth in the Order of November 21, 1985.

DONE this 27th day of December, 1985.

/s/ Patrick H. Sims
Patrick H. Sims
UNITED STATES MAGISTRATE

December 27, 1985

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NUMBER: 84-0951-C-S

WILLIAM H. McGILL,

Plaintiff,

versus

CITY OF MOBILE, et al.,

Defendants.

OBJECTION TO RECOMMENDATION
OR ORDER OF MAGISTRATE

Defendant, Chris Galanos, objects to the recommendation or order of the Magistrate dated December 27, 1985 with regard to the depositions of this defendant's treating physicians and requests a hearing before the district judge.

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Attorneys for Defendant,
Chris Galanos

/s/ DAVIS CARR
DAVIS CARR
Post Office Box 123
Mobile, Alabama 36601

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 2nd day of January, 1986, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing a copy of same by United States Mail, properly addressed and first class postage prepaid.

/s/ DAVIS CARR
DAVIS CARR

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

84-0951-C-S

WILLIAM H. McGILL,

Plaintiff,

versus

CITY OF MOBILE, et al.,

Defendants.

Filed February 3, 1986

AMENDED MOTION TO QUASH DEPOSITIONS
OF DR. RUMPANOS AND DR. RUDDER,
AND MOTION FOR PROTECTIVE ORDER

Defendant, Chris Galanos amends the previously filed motions to quash the depositions of Dr. Rumpanos and Dr. Rudder, which depositions were attempted by counsel for plaintiff to be taken, and defendant further files this motion for protective order, for the following separate and several reasons:

1. This is a case by a former police officer alleging, in essence, that his right of free speech was violated by defendants, and that defendants unlawfully conspired to deprive plaintiff of his employment. Counsel for plaintiff wishes to depose two physicians who treated this defendant, because it is plaintiff's "belief" that Galanos was taking controlled substances at the time of his arrest.

2. Whether Galanos was taking medication on the evening plaintiff detained this defendant is not relevant or material to the issues raised by plaintiff's complaint; namely, whether this defendant unlawfully conspired with others to deprive plaintiff of constitutionally protected rights. Even further, assuming that in fact, Galanos was taking prescribed medication at the time, that that would not be admissible to show that, at the time and place plaintiff detained Galanos, Galanos had abused the medication.

3. Allowing the testimony of Drs. Rudder and Rumpanos could and/or would violate Galanos' right of privacy as recognized in United States Supreme Court decisions, and would further violate Galanos' rights protected by the first, fourth, fifth, ninth and tenth amendment rights.

4. Rule 402 of the Federal Rules of Evidence provides that all relevant evidence is admissible, except as otherwise provided by the constitution, by act of Congress, these rules, or by "other rules prescribed by the Supreme Court pursuant to statutory authority." In this regard, first, Rule 501 of the Federal Rules of Evidence provides that, with respect to privileges, principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience shall govern such privileges. In civil actions with respect to an element or claim as to which state law supplies the rule of decision, however, privileges shall be determined in accordance with state law. Further while Congress did not enact the specific proposed rules addressing privileges, "the general mandate of Rule 501 was substituted by Congress for a set of privilege rules drafted by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by this Court." *Trammel v. United States*, 445 U.S. 40, 47 (1980). Proposed Rule 504 would have provided a privilege for psychotherapist/patient communications. See e.g.,

56 F.R.D. 240, which notes that "many states have by statute created the privilege." *Id.* at 241.

5. Plaintiff alleges that Galanos was guilty of drug abuse, and that is the avowed purpose of taking these two depositions. Without agreeing that there was such abuse, but for the sake of argument, Federal law recognizes the importance of confidentiality of patients seeking alcohol and drug abuse. 42 U.S.C. §4582(a); 42 C.F.R. §2.2. This federal privilege would apply to any individual who has applied for or been given diagnosis or treatment for drug abuse or alcohol abuse. 42 C.F.R. §2.11(i), and the prohibition of the disclosure of information about an alcohol or drug abuse patient covers *all* information about patients, including their "attendance or absence, physical whereabouts, or status as patients." 42 C.F.R. §2.13(c). The act is so strong that a hospital or physician served with a subpoena for patient information covered by the regulations may not identify the act which provides confidentiality, because by such a citation, the patient would be identified as a drug abuser or alcohol abuser, and that identification would violate the statute 42 C.F.R. §2.13-1(d).

6. Alabama State Law further recognizes the privilege with regard to communications between a patient and his or her psychiatrist or psychologist. Alabama Code §34-26-2 (1975). Further, medical doctors who reveal confidences provided by patients are subject to civil liability. *Horne v. Patton*, 291 Ala. 701, 287 So. 2d 824 (1973).

7. It would violate principles of comity and federalism to recognize the state privilege in state court, and in diversity cases, but to disallow the avowed policy of the sovereign State of Alabama by the fortuitous event that the plaintiff is seeking a claim based on a federal cause of action. See cases cited in accompanying letter brief.

8. Assuming that the court is of the opinion that such information may be relevant, and not privileged, Rule 403 of the Federal Rules of Evidence provides that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Given the issues in this case as framed by the plaintiff's complaint, the question of Galanos' medical treatment would certainly be a classic illustration of such unfair prejudice, confusion of issues, and danger of misleading the jury. Whether Galanos was receiving such treatment had nothing to do with plaintiff's termination, and whether the defendants violated plaintiff's constitutional rights in that termination.

9. Finally, Rule 26(c) of the Federal Rules of Civil Procedure provides that the Court may grant a protective order when justice requires to protect a party from annoyance, embarassment, oppression. As set forth hereinabove, such a protective order denying the testimony sought is justified in this case.

This motion is accompanied by a letter brief to the Court, which should be read for a full explanation in support of the above arguments. For the foregoing reasons, the Court should not allow the deposition testimony of Dr. Rumpanos and Dr. Rudder.

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Attorneys for Defendant,
Chris Galanos

/s/ DAVIS CARR
DAVIS CARR
Post Office Box 123
Mobile, Alabama 36601

ORAL ARGUMENT REQUESTED

REFERRED TO JUDGE COX
For Ruling or Appropriate Action
Date: February 5, 1986

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 84-0951-C

WILLIAM H. McGILL,

Plaintiff,

versus

CITY OF MOBILE, et al.,

Defendants.

MEMORANDUM OPINION

This matter is before the court on the defendant Chris Galanos' objection (Doc. #52) to the Magistrate's order dated December 27, 1985 (Doc. #48) granting the plaintiff's motion to compel testimony from deponents Dr. William H. Rudder (Doc. #46) and Dr. Socrates N. Rumpanos (Doc. #47). Also before the court is the defendant Chris Galanos' amended motion to quash depositions of Dr. Rumpanos and Dr. Rudder and a motion for protective order (Doc. #61). The defendant's objection to the Magistrate's order will be treated as a motion for reconsideration. It is,

ORDERED that the motion is GRANTED.

Upon reconsideration the court is not convinced that the Magistrate's order is clearly erroneous or contrary to law. 28 U.S.C. §636(b)(1)(A) (1985). The court, therefore, declines to overrule or modify the order of the Magistrate.

The amended motion to quash depositions and motion for protective order (Doc. #61) are hereby DENIED.

DONE this 25 day of June, 1986.

/s/ EMMETT R. COX
EMMETT R. COX
UNITED STATES DISTRICT JUDGE

RECEIVED June 25, 1986

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7628

IN RE:

CHRISTOPHER N. GALANOS,

Petitioner.

Filed October 3, 1986
Miguel J. Cortez, Clerk

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Alabama

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Before GODBOLD, VANCE and JOHNSON, Circuit Judges

BY THE COURT:

The petition for writ of mandamus is denied.

APPENDIX I

UNITED STATES DISTRICT COURT
Southern District of Alabama
123 United States Courthouse
Mobile, Alabama

JOHN V. O'BRIEN
CLERK

MAILING ADDRESS:
P.O. Box 2625
MOBILE, ALA. 36652
205-690-2371
FTS
537-2371

OCTOBER 15, 1986
(Date)

Mr. Vincent F. Kilborn, III

Mr. W. A. Kimbrough, Jr.

Mr. Davis Carr

Mr. James B. Rossler

RE: CIVIL ACTION NO. 84-051-AH
WILLIAM H. McGILL VS.
CITY OF MOBILE, ET AL

Dear Counsel:

This is to advise each of you that the above styled and numbered case has been transferred from the docket of **JUDGE EMMETT R. COX** and is now assigned to the docket of **JUDGE ALEX T. HOWARD, JR.**

If this case is presently set on a motion docket, status conference, for a preliminary pre-trial conference, final pre-trial conference or trial, these settings are CANCELLED.

If this transfer is made prior to the date that Judge Howard is sworn in, any emergency motions or other matters requiring immediate action will be handled by Judge Cox.

To insure that your pleadings are referred to the proper Judge with as little delay as possible, please use the suffix "**AH**" after the case number on all pleadings.

Very truly yours,

JOHN V. O'BRIEN, CLERK

BY - /s/ William E. Taylor
Deputy Clerk

Copy to:

Court File